91-1805

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ACKERMAN, HOOD & MCQUEEN, INC.,
Petitioner,

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 4, 1992

QUESTIONS PRESENTED

(As used herein, "Title VII" refers to Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §§2000e, *et seq.*, as amended by the Pregnancy Discrimination Act of 1978, 92 Stat. 2679, 42 U.S.C. §2000e(k).)

1. Whether Title VII requires an employer to grant a pregnant employee's request to be categorically exempted from working more than 40 hours per week for the duration of her pregnancy where (i) the employee in question unequivocally expresses to her employer her intent not to work more than 40 hours per week for the duration of her normal, healthy pregnancy, regardless of her actual physical condition and (ii) health-related requests for schedule accommodations from other employees had uniformly been granted only on an as-needed basis?

2. Whether Title VII requires an employer to grant a pregnant employee's request to be categorically exempted from working more than 40 hours per week where the employee in question never communicated to any supervisor that she was experiencing any pregnancy-related symptoms and never communicated to any supervisor any inability to perform the functions of her job?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Ackerman, Hood & McQueen, Inc., and the Respondent, Equal Employment Opportunity Commission (EEOC). The action in the District Court was brought by the EEOC for the benefit of Phyllis Torbeck, a former employee of Ackerman, Hood & McQueen, Inc.

Ackerman, Hood and McQueen, Inc. has no parent company, nor does it have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
JURISDICTION OF THE DISTRICT COURT	3
FACTS	3
A. INTRODUCTION	3
B. DETAILED STATEMENT	4
C. DISPOSITION IN THE COURTS BELOW	8
REASONS FOR GRANTING THE WRIT	10
THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS WITH RESPECT TO:	
(A) THE KIND OF COMPARISON WHICH MAY FORM THE BASIS OF A DETERMINATION THAT AN EMPLOYER HAS DISCRIMINATED AGAINST AN EMPLOYEE IN A DISPARATE TREATMENT CASE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964; AND	

(B) WHETHER AN EMPLOYEE'S COMMUNICATION OF THE FACT OF HER NORMAL, HEALTHY PREGNANCY, WITHOUT MORE, IS SUFFICIENT TO TRIGGER THE ANTIDISCRIMINATION PROTECTION OF TITLE VII, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT 10

A. THE COMPARISON ISSUE 11

B. THE COMMUNICATION ISSUE 15

CONCLUSION 16

APPENDICES

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED FEBRUARY 20, 1991 ..... A-1

APPENDIX B

JUDGMENT, FILED MARCH 5, 1991 ..... B-1

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 10, 1992 ..... C-1

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona Governing Committee v. Norris, 463 U.S. 1063 (1983) 13

Equal Employment Opportunity Commission v. Ackerman, Hood & McQueen, Inc., 58 Fair. Empl. Prac. Cases (B.N.A.) 114 (10th Cir. 1992) 1, 15

Equal Employment Opportunity Commission v. Ackerman, Hood & McQueen, Inc., 758 F.Supp. 1440 (D.C.W.D. Okla. 1991) 1

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13

International Union, UAW v. Johnson Controls, ____ U.S. ____, 111 S. Ct. 1196 (1991) 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 13

Muller v. Oregon, 208 U.S. 412 (1908) 11

Texas Department of Community Services v. Burdine, 450 U.S. 248 (1981) 8, 13

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) 13

STATUTES

28 U.S.C. §1254 1
28 U.S.C. §§1331, 1337, 1343 and 1345 3
42 U.S.C. §2000e(k) 3
42 U.S.C. §§2000e, *et seq.* 3
78 Stat. 253, 42 U.S.C. §§2000e, *et seq.* i
78 Stat. 255, 42 U.S.C. §2000e-2 2
92 Stat. 2679, 42 U.S.C. §2000e(k) ..... i, 2

TREATISES

Schlei and Grossman, *Employment Discrimination Law* (2d ed., B.N.A. 1983) 13

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JURISDICTION

The judgment sought to be reviewed was entered on February 10, 1992 by the United States Court of Appeals for the Tenth Circuit.

No petition for rehearing was filed in the court below.

Jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit is conferred by 28 U.S.C. §1254.

STATUTES INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. §2000e-2:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

The Pregnancy Discrimination Act of 1978, 92 Stat. 2679, 42 U.S.C. §2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

STATEMENT OF THE CASE

Jurisdiction of the District Court.

The subject matter jurisdiction of the United States District Court for the Western District of Oklahoma in this action was conferred by 28 U.S.C. §§1331, 1337, 1343 and 1345.

Facts.

A. **Introduction.**

This action was filed by the Equal Employment Opportunity Commission (EEOC) against Ackerman, Hood & McQueen, Inc. (AHM), an advertising, marketing and public relations firm based in Oklahoma City. The action was brought for the benefit of Phyllis Torbeck, who was employed by AHM from late 1984 until she was discharged by AHM in April, 1986.

The EEOC alleged that AHM's discharge of Torbeck constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§2000e, *et seq.* including particularly the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. §2000e(k).

The District Court agreed with the EEOC and awarded injunctive relief as well as approximately $21,000 in back pay for Torbeck. A. B-1.[1]

The essence of the EEOC's case was that (i) AHM was obligated, under Title VII and the PDA, to honor Torbeck's request, made early in her pregnancy, that she be granted a categorical exemption from working overtime for the dura-

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[1] "A." refers to the appendix to this Petition. "Aplt. App." refers to the Appellant's Appendix in the court below.

tion of her pregnancy, regardless of her physical condition, and (ii) AHM's discharge of Torbeck after she made clear her intent not to work overtime for the duration of her pregnancy was motivated by her pregnancy and thus violated Title VII.

The essence of AHM's defense was that it was not obligated by Title VII to grant Torbeck's request because (i) it had granted schedule adjustments or other accommodations to other employees only on an as-needed basis, and (ii) Torbeck never communicated to any supervisor that she was experiencing any pregnancy-related symptoms and never communicated to any supervisor any inability to perform the functions of her job. The factual basis for AHM's contentions in the court below and in this Court consists almost entirely of stipulated facts, documentary evidence, and the testimony of Mrs. Torbeck and her physician.

The District Court, finding that AHM was indeed obligated to grant Torbeck's request, entered judgment for the EEOC. A. B-1. The Court of Appeals affirmed for substantially the same reasons as were relied upon by the District Court in finding a Title VII violation in the first instance. A. C-1.

B. **Detailed Statement.**

On January 10, 1986, Torbeck, then employed by AHM as a secretary, was told that she was pregnant. She was approximately five weeks pregnant at that time. From January, 1986 until she was discharged by AHM on April 3, 1986, Torbeck worked an average of less than one hour per week overtime. Aplt. App. 388.1; *id.* 388.

On April 2, 1986, Mrs. Torbeck presented her employer with a letter from her physician which stated, in its entirety:

> TO WHOM IT MAY CONCERN:
>
> RE: PHYLLIS TORBECK
>
> Mrs. Torbeck has been under my medical care since early in her current pregnancy. Her estimated due date is September 14, 1986.
>
> She is in good health, but because of her pregnancy, it is my recommendation that she not be required to work more than a 40 hour work week.
>
> Sincerely,
> /s/
> J. Gregory Cox, M.D.

Aplt. App. 175.

Mrs. Torbeck acknowledged at trial that she did not say anything to any supervisor at AHM about any symptoms or physical problems caused by her pregnancy. Aplt. App. 312-314. Her physician acknowledged that Torbeck's pregnancy was a normal, uncomplicated pregnancy. Aplt. App. 354-55, 357, 359. When Mrs. Torbeck met with her supervisor after presenting the letter from Dr. Cox, she nevertheless stated unequivocally that she intended to limit her work week to 40 hours for the duration of her pregnancy. Aplt. App. 168; *id.* 320.

After Mrs. Torbeck made it clear that she ruled out day-by-day determination of her needs, she was discharged. She was discharged because, in the words of AHM's president, "she categorically refused to work overtime." Aplt. App. 264.

The District Court's finding of discrimination was based upon its comparison of AHM's denial of Mrs. Torbeck's request for a prospective exemption from overtime, for the duration of her pregnancy, with AHM's grant of:

- sick leave and personal leave to an employee who traveled from Oklahoma City to Los Angeles for corrective surgery to remove a decomposing nasal implant. Aplt. App. 43.
- medical leave to Mrs. Torbeck in the fall of 1985 so that she could have abdominal surgery (laparotomy/microtuboplasty) for the purpose of enabling her to become pregnant. Aplt. App. 44; *id.* 304.
- a temporarily reduced work schedule to an employee who needed treatment and rest to recover from what Mrs. Torbeck herself described as "psychological problems" which caused the employee to suffer "great distress." Aplt. App. 170; *id.* 302.

The finding that AHM discriminated against Mrs. Torbeck because she was pregnant was based on no other comparisons. A. A-14-15.

Mrs. Torbeck's physician's record of his care of Mrs. Torbeck during her pregnancy showed no indication of any pregnancy-related symptoms or complications at any point in her pregnancy other than a notation of fatigue at the initial prenatal visit. Aplt. App. 379.14-16.

Mrs. Torbeck has no recollection of ever having told any supervisor at AHM about having had

a problem with fatigue at any time before she was discharged. Aplt. App. 313. Other than (i) telling one supervisor one time that she had a headache, and (ii) telling another supervisor, in February, 1986, about a headache which she thought was caused by the word processing equipment, Mrs. Torbeck could cite no instances in which she told anyone in a supervisory capacity about having a headache. Aplt. App. 313-14. Most importantly, Mrs. Torbeck never suggested to her supervisors that there was any medical necessity for elimination of further overtime work. Aplt. App. 312. The District Court explicitly found that "[p]rior to April, 1986, Torbeck did not complain to AHM management that her pregnancy was causing physical problems." A. A-16.

When Mrs. Torbeck's physician wrote the March 31 letter (quoted in full at p. 5, *supra*) for Mrs. Torbeck:

- Mrs. Torbeck was in good health and enjoying a normal pregnancy. Aplt. App. 357-59; *id.* 175.
- He had no knowledge at all as to how much overtime Mrs. Torbeck was working, nor did he know whether her overtime was being put in principally by way of longer days or longer weeks. Aplt. App. 359.
- He was aware of no possible complications with Mrs. Torbeck's pregnancy. Aplt. App. 359.
- He was not of the opinion that curtailment of Mrs. Torbeck's work schedule was medically necessary. Aplt. App. 359-60, 363.

— Mrs. Torbeck did not give him any information as to what she was doing to attempt to alleviate her symptoms. Aplt. App. 370.

— He had no knowledge as to how her employer was working with her or whether her employer was inclined to work with her as a pregnant employee, assessing her situation and her physical problems, if any, on a day-by-day basis. Aplt. App. 371.

When Mrs. Torbeck called her physician's office to get the March 31 letter, there was no discussion of whether it was medically necessary for Mrs. Torbeck to be excused from further overtime nor was there any discussion of the health of Mrs. Torbeck's baby. Aplt. App. 310-11.

After Mrs. Torbeck presented her physician's letter to her supervisors, she made it clear, in response to repeated inquiries, that she was not going to work more than 40 hours per week while she was pregnant. Aplt. App. 168; *id.* 320. Torbeck was then discharged from her employment. Her son was born later that year. Aplt. App. 161.

C. **Disposition in the Courts Below.**

The EEOC did not offer, and the District Court did not find, any direct evidence that AHM acted with discriminatory intent in discharging Mrs. Torbeck. Thus, the court proceeded on the basis of a prima facie case analysis under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Department of Community Services v. Burdine,* 450 U.S. 248 (1981).

The District Court found that the reason given by AHM for the discharge of Mrs. Torbeck — her refusal to work more than 40 hours per week, regardless of how she might be feeling on any particular day — was pretextual, and, relying on the three comparisons set forth above, found that Mrs. Torbeck had been discriminated against in violation of Title VII. A. A-13, 14, 17, 29, 30.

The District Court and the Court of Appeals both noted, and were apparently influenced by, the fact that the earliest recorded criticism of Torbeck's attitude toward working overtime was made shortly after Torbeck informed AHM of her pregnancy, approximately ten weeks before she was discharged. A. A-1, 15. This formed the basis of the District Court's finding that AHM's proffered reason for discharging Torbeck was pretextual. A. A-15.

The EEOC made no contention that the medical problems which were involved in the three comparative situations relied upon by the courts below were not bona fide, nor did the EEOC offer any evidence to that effect. Aplt. App. 13-16. Likewise, the EEOC did not contend or offer evidence to the effect that the medical problems which were involved in the three comparative situations were not communicated to AHM. *Id.*

Reasons for Granting the Writ

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS IMPORTANT QUESTIONS WITH RESPECT TO:

(A) THE KIND OF COMPARISON WHICH MAY FORM THE BASIS OF A DETERMINATION THAT AN EMPLOYER HAS DISCRIMINATED AGAINST AN EMPLOYEE IN A DISPARATE TREATMENT CASE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964; AND

(B) WHETHER AN EMPLOYEE'S COMMUNICATION OF THE FACT OF HER NORMAL, HEALTHY PREGNANCY, WITHOUT MORE, IS SUFFICIENT TO TRIGGER THE ANTIDISCRIMINATION PROTECTION OF TITLE VII, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT

The essence of Title VII of the Civil Rights Act of 1964 lies in the fact that Title VII is *antidiscrimination* legislation. The Pregnancy Discrimination Act of 1978 does not change that. This case presents the occasion — and the need — for explicit clarification of the kind of comparison in treatment of employees which is necessary as an indispensable prerequisite to a determination that an employer has engaged in discrimination in violation of Title VII, as amended by the PDA. Likewise, this case presents the occasion and the need for explicit affirmation that a finding of discrimination under Title VII may not be predicated upon facts or

employee attributes which were not made known to the employer at the time of the challenged employment-related decision.

Employers need to know what kinds of treatment of nonpregnant employees will trigger an obligation, under the PDA, to grant an accommodation when requested by a pregnant employee. Women workers need to know whether they will be stigmatized by judicial treatment of pregnancy as, de facto, a "delicate condition" warranting substantive protection (as opposed to antidiscrimination protection) and entitling the pregnant worker to preferential treatment reminiscent of the day when the law interceded to protect women "in the proper discharge of [their] maternal functions." *Muller v. Oregon*, 208 U.S. 412, 422 (1908). For these reasons, this case presents important questions of federal law which should be settled by this Court.

A. **The Comparison Issue.**

It is undisputed that Phyllis Torbeck, who had worked less than one hour per week of overtime during the twelve weeks preceding AHM's termination of her employment, was enjoying a normal, healthy pregnancy when she demanded that, because of her pregnancy, she be granted a categorical exemption from working overtime for the duration of her pregnancy.[2]

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[2] It is noteworthy, although admittedly not dispositive, that the accommodation requested by Torbeck would have been entirely unavailing on the first three, and usually the first four, working days of the week. On one hand, after presenting her physician's letter to AHM, Mrs. Torbeck made it clear to AHM that she would in no event work more than 40 hours per week for the remainder of her pregnancy. Aplt. App. 168; *id.* 320. On the other hand, as Mrs. Torbeck admitted and as the District Court repeatedly noted, the recommendation by Dr. Cox that Mrs. Torbeck

There is no contention or suggestion in this case that, prior to her discharge from her employment by AHM, Torbeck had communicated any pregnancy-related difficulties or symptoms to AHM. The courts below nevertheless found a violation of Title VII, as augmented by the Pregnancy Discrimination Act of 1978, on the basis of a comparison of AHM's refusal to grant Torbeck's request with AHM's previous grant of accommodations in these three — and only these three — situations:

1. Sick leave and personal leave to an employee who needed to have a decomposing nasal implant removed — and who communicated that need.

2. Medical leave for Torbeck herself, at her request, so that she could have abdominal surgery for the purpose of enabling her to become pregnant.[3]

3. A temporarily reduced work schedule to an employee who needed — and communicated the need for — treatment and rest to recover

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(n. 2 continued)
"not be required to work more than a 40 hour work week," (letter quoted in full at p. 5, *supra*), even if adhered to by AHM in every respect, would have done Mrs. Torbeck no good at all if, on a Tuesday, while experiencing a backache, she had been asked to stay until eight or nine at night. The 40 hour recommendation, which was the only recommendation made by Torbeck's physician and the only "request" made by Mrs. Torbeck, bore no relation to what Mrs. Torbeck's needs might be if she hadn't yet worked 40 hours in any given week.

[3] The reliance by the courts below on AHM's accommodation of Torbeck's request for time off to have fertility surgery, as an instance in which AHM granted an accommodation without a showing of medical necessity, is particularly egregious. A. A-14 and C-4. The issue was not the medical necessity of the abdominal surgery (any more than there would be an issue as to the "medical necessity" of having a motorcycle accident), but whether or not a person would be able to work after undergoing such surgery.

from what Mrs. Torbeck herself described as "psychological problems" which caused the employee to suffer "great distress."

As antidiscrimination legislation, Title VII imposes no substantive requirements as to treatment of employees. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). Moreover, this Court has made it clear that "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *Arizona Governing Committee v. Norris*, 463 U.S. 1063, 1084 (1983). *See also, International Union, UAW v. Johnson Controls*, ___ U.S. ___, 111 S. Ct. 1196, at 1203 (1991).

In disparate treatment cases in which the plaintiff does not rely upon direct evidence of discriminatory motive, the plaintiff's attempt to raise an "inference of unlawful discrimination," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, at 253, is almost invariably based upon a comparison of the treatment accorded to plaintiff with the treatment accorded other employees. *See, U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, at 713-14 and n. 2 (1983); *Burdine, supra*, 450 U.S. at 253, n. 6; *McDonnell Douglas, supra*, 411 U.S. at 802. *See generally*, Schlei and Grossman, *Employment Discrimination Law*, at 1291 (2d ed., B.N.A. 1983) (disparate treatment cases "generally require . . . comparative evidence demonstrating that the treatment of the plaintiff differs from that accorded to otherwise 'similarly situated' individuals who are not in plaintiff's protected group.").

A single unassailable principle — nondiscrimination — served as the moral and political driving force for enactment of Title VII. That central principle, unmistakably embodied in the text of the operative provisions of Title VII, is, of course, subverted to the extent that an adjudication that "discrimination" has occurred is based upon a baseless or otherwise impermissible comparison.

If "discrimination" can be found on the basis of comparison of situations as foreign to each other as those relied upon by the lower courts in the case at bar, Title VII has become a license for the EEOC and ultimately the judiciary to impose their substantive notions of fairness or reasonableness[4] upon the employer-employee relationship, while giving only the slightest lip service — or none at all — to the requirement that, if discrimination is to be found in a disparate treatment case in which direct comparisons are relied upon, the comparisons relied upon must involve truly comparable situations, truly comparable employee requests and truly disparate employer responses.

It is abundantly clear from the decisions of the courts below that, after more than 25 years of litigation under Title VII, the time has come for reaffirmation that the requirement of a finding of discrimination, as the *sine qua non* of Title VII

[4] The District Court found as a matter of fact and as a matter of law that Torbeck's request to be categorically exempted from overtime for the duration of her pregnancy, without regard to her actual condition on any given occasion was "reasonable." A. 17 (findings of fact) and 30 (conclusions of law). Nothing in the text of Title VII or in any decision by this Court supports the proposition that the substantive reasonableness of an employee's request is relevant for purposes of Title VII analysis.

liability, cannot be satisfied by pointing to other employees who got what they wanted if the plaintiff cannot show that her situation and her request were truly comparable and meaningfully communicated.[5]

B. **The Communication Issue.**

The exclusive factual basis proffered by Mrs. Torbeck for her request to be categorically exempted from overtime for the duration of her pregnancy was her physician's letter (quoted in full at p. 5, *supra*) which attested to her good health. Torbeck did not claim to have communicated with her employer about her pregnancy-related needs, if any, in any other way. When clarification was sought, she volunteered nothing other than her intent not to work more than 40 hours per week. Aplt. App. 168; *id.* 320. Her physician's letter, of course, made no reference to complications of pregnancy or to any symptoms or to any disability. The only representation of fact as to Mrs. Torbeck's condition in the physician's letter was its express and unambiguous attestation to Mrs. Torbeck's good health.

Even if the actual necessities of Torbeck's situation were comparable with the situations of

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[5] The observation by the Court of Appeals that AHM contended in that court that the District Court erred "because it did not compare Torbeck's treatment under the leave policy with that of her male coworkers," A. C-7-8, is inexplicable. To be sure, AHM did point out in its brief in the Court of Appeals that all of the comparable situations cited by the District Court involved AHM's accommodation of the medical needs of women. However, five pages later, AHM stated that "[D]iscrimination between pregnant and non-pregnant women (*e.g.*, medical coverage for a woman who has a stroke but not for a woman who has a miscarriage) could quite easily violate" the PDA. *Brief of Appellant* at 26-27, 32, *Equal Employment Opportunity Commission v. Ackerman, Hood & McQueen, Inc.*, 58 Fair. Empl. Prac. Cases (B.N.A.) 114 (10th Cir. 1992).

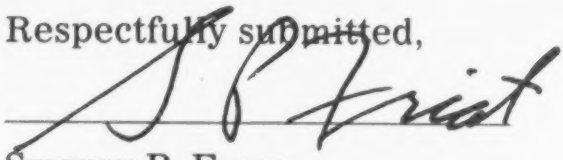
the employees cited by the courts below for comparison purposes, and even if the accommodation she requested was commensurate with her actual needs, this case illustrates the need for a clear affirmation, as a matter of fundamental Title VII law, that a finding of discrimination under Title VII may not be predicated upon facts or employee attributes which were not made known to the employer at the time of the challenged decision.

CONCLUSION

On the basis of comparisons of AHM's treatment of Mrs. Torbeck with AHM's treatment of employees in three other situations, the courts below have determined that AHM's discharge of Mrs. Torbeck violated Title VII. In each of the three situations relied upon for comparison purposes, the employee (i) unquestionably articulated a need which would affect her ability to do her job, (ii) in fact faced a situation which involved actual illness or disability, and (iii) neither sought nor received an accommodation which exceeded the need which was articulated. The record demonstrates these facts beyond cavil.

Lest the requirement of a finding of discrimination be silently but effectively excised from our fundamental antidiscrimination law, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-727-P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

ACKERMAN, HOOD & MCQUEEN, INC.
Defendant.

[Filed Feb. 20, 1991]

Findings of Fact and Conclusions of Law

I. BACKGROUND

A. Summary of Facts and Ruling

In January 1986, Phyllis Kay Torbeck, a secretary, learned that she was pregnant and announced this fact to her coworkers. Torbeck was working in the secretarial pool of the Oklahoma City office of Ackerman, Hood & McQueen ("AHM"), an advertising and public relations firm. Prior to her pregnancy, Torbeck had never been disciplined at AHM, and her personnel file contained no indication of adverse comments or counseling sessions. As a pregnant employee at AHM, Torbeck would have been eligible to take six weeks of paid maternity leave at the time she gave birth to her child.

On January 14, 1986, four days after Torbeck's pregnancy test, the chairman of AHM "counseled" Torbeck about her alleged unwillingness to work overtime, including time in the evenings and on Saturdays and Sundays. The AHM officer, Raymond B. Ackerman, wrote in a memorandum after the ses-

sion that he had reminded Torbeck that a condition of her employment required her to be available "on any evening or any day of the weekend requested."

Three months after the counseling session, AHM fired Torbeck. Torbeck had been experiencing some of the physical symptoms of a typical pregnancy — fatigue, headaches, and lower back pain. At her request, Torbeck's obstetrician sent a letter to AHM that recommended that she work no more than 40 hours a week; the doctor also noted in the letter that Torbeck was in "good health." AHM discharged Torbeck on April 3, 1986, the day after she submitted her doctor's letter. AHM's position essentially was that Torbeck was fired for insubordination because she intended to follow her doctor's recommendation and not work overtime, despite the fact she was in good health.

In this discriminatory discharge action, the Equal Opportunity Employment [sic] Commission ("the EEOC") alleged that AHM fired Torbeck in violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), including the Pregnancy Discrimination Act of 1978. The EEOC argued that because she was pregnant AHM treated Torbeck's request to reduce her working hours differently than similar requests made by other employees. In response, AHM insisted that Torbeck had refused to work overtime and had not presented the company with valid medical evidence to support her request to work fewer hours.[1]

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[1] The Court's summary of the facts closely follows the statement of the case upon which the parties agreed. The parties' statement:

> The Plaintiff alleges that Phyllis Torbeck was discharged from her employment as a Secretary for the Defendant due to her pregnancy. On April 2, 1986, Phyllis Torbeck gave to the Defendant a letter from her obstetrician in which the doctor advised the Defendant that Torbeck should not work more than forty (40) hours per week because

The Court has concluded that Torbeck would not have been fired had she not been pregnant. AHM treated her request for a schedule adjustment differently than the firm handled other similarly situated employees' requests. The evidence shows that AHM liberally granted leaves and work schedule adjustments to other employees for medical and other reasons under an unwritten policy. In considering Torbeck's request, AHM applied a higher standard; the firm justified her firing by insisting that she had failed to provide sufficient evidence of medical need.

B. Trial Procedure and Attorneys

Using an affidavit procedure,[2] the Court heard

(n. 1 continued)
of her pregnancy. The following day, Torbeck was discharged. The Defendant had no written policy regarding medical leaves, personal leaves, or schedule adjustments and selectively discriminated against Torbeck, because of her pregnancy. A comparison will be made between Torbeck and similarly situated non-pregnant employees. Testimony will be presented regarding accommodations made for non-pregnant employees who needed work schedule adjustments.

The Defendant denies that it discriminated in any way against Ms. Torbeck. As is more fully set forth in Defendant's trial brief, the Defendant asserts, principally, that, when she was discharged by Defendant, Ms. Torbeck was (as confirmed in writing by her gynecologist) enjoying a healthy, normal pregnancy, and had given Defendant no reason to believe that her pregnancy necessitated an across-the-board work schedule modification.

Final Pre-Trial Order at 1 (filed Nov. 29, 1990) [hereinafter Pretrial Order].

[2] Under the procedure, the parties prior to trial filed affidavits containing all of the proposed direct testimony of each of the witnesses to be called in the cases in chief. At trial, the Court allowed 10 to 15 minutes of direct examination of each witness in order to enable the attorneys to emphasize portions of the testimony contained in the affidavits. Each witness then was tendered for cross-examination. Adverse witnesses were exempt from the affidavit procedure.

In nonjury trials, whether complex or relatively uncomplicated, the affidavit procedure can eliminate unnecessary evidentiary presentations, reduce the costs to the litigants of the attorneys' trial time, and enable counsel to emphasize to the Court the areas of actual legal and factual dispute. In applying the affidavit procedure, the Court emphasizes more than efficiency. Among the potential

testimony in the bench trial on January 3 and 4, 1991.

All counsel were extremely well prepared and represented their clients with the highest degree of professionalism. Tela L. Gatewood, supervisory trial attorney, and Nancy Dean Edmonds, trial attorney, both of the EEOC office in Dallas, represented the EEOC. Stephen P. Friot and Barbara L. Swimley, of the law firm Spradling, Alpern, Friot & Gum, of Oklahoma City, represented AHM.

II. EXHIBITS

The Court received into evidence without objection the following plaintiff's exhibits: Nos. 1-30. The Court received into evidence without objection the following defense exhibits: Nos. 1, 3-6, 10-13. The Court rejected Defendant's Exhibit No. 7. The Court sponsored the following exhibits: Court's Exhibit Nos. A-Q.[3]

III. WITNESSES

The EEOC called the following witnesses in its case in chief: Ron Cawthon, former AHM employee; Karen Cottrell, AHM public relations account manager, Washington, D.C., office; James Gregory Cox, M.D., obstetrician and gynecologist; Betty Jo Garner, EEOC paralegal specialist, Dallas district office; Beverly J. Harp, owner of a firm at which Torbeck sought employment; Kathie Jo Marshall, former supervisor of the AHM secretarial pool; Phyllis Kay Torbeck, former AHM secretary; and Ruby Elaine Williamson, former AHM secretary.

(n. 2 continued)
advantages of the procedure to a court and the attorneys: (1) by preparing more of the case on paper, counsel may be able to better organize and explain the evidence and the legal issues; (2) counsel should be in a better position to concentrate on, and better develop, the legal and factual issues that are likely to be dispositive of the case; and (3) the procedure may help eliminate pretrial disputes that can be resolved through stipulation and compromise.

[3] The Court received additional exhibits over objection as reflected in the record.

AHM called the following witnesses in its case in chief: Raymond B. Ackerman, chairman of the board of directors of AHM; Bruce E. Anderson, AHM executive vice president and director of client services; Karen Cottrell (also an EEOC witness); Jeanette Elliott, AHM senior vice president and creative director; Jana Fielder, assistant to Raymond Ackerman at AHM; Donald J. Loewen, AHM art director; Laura L. Mackie, M.D., obstetrician and gynecologist; Nancy Martin, AHM director of traffic, Tulsa office; Angus L. McQueen, president and chief executive officer of AHM; Christy Tebow, AHM creative services manager; Jenifer J. Ware, former supervisor in AHM accounting office; Patti Weinbrenner, AHM senior vice president; and William F. Winkler, Jr., AHM chief financial officer.

IV. STIPULATIONS

The parties provided the Court with written stipulations in which they agreed on the following matters:

A. All parties are properly before the court.

B. The court has jurisdiction of the parties and of the subject matter.

C. All parties have been correctly designated.

D. There is no question as to misjoinder or nonjoinder of parties.

E. Facts:

1. The Plaintiff is an agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. Section 2000e-5(f)(1).

2. At all relevant times, the Defendant has continually been an employer doing business in . . . Oklahoma City, Oklahoma and has continuously had at least 15 employees.

3. At all relevant times, the Defendant has continuously been and is now an employer engaged in an industry affecting interstate commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

4. Ackerman, Hood & McQueen is an advertising, marketing and public relations firm based in Oklahoma City. The Chairman of the Board of Ackerman, Hood & McQueen is Ray Ackerman. The President and Chief Executive Officer is Angus L. McQueen. Messrs. Ackerman and McQueen reside in Oklahoma City.

5. Phyllis Torbeck, a female, was hired as a secretary by the Defendant on December 17, 1984.

6. From December 17, 1984, until approximately October 11, 1985, Torbeck's direct supervisor was Ray Ackerman.

7. During the initial period of her employment at Ackerman, Hood & McQueen, Mrs. Torbeck was an executive secretary to Mr. Ackerman and two account executives. Under this arrangement, Mrs. Torbeck reported to, and worked only for, Mr. Ackerman and the two account executives.

8. From the beginning of her employment at Ackerman, Hood & McQueen, through the summer of 1985, Mrs. Torbeck was required to work very little overtime.

9. Defendant permitted Torbeck to take time off from October 14, 1985, through November 10, 1985, to enable her to have surgery.

10. From November 11, 1985, until February 21, 1986, Torbeck's direct supervisor was Karen Cottrell.

11. From November 11, 1985, until February 21, 1986, Bruce Anderson was Karen Cottrell's supervisor.

12. From February 24, 1986, until April 3, 1986, Torbeck's direct supervisor was Kathy Jo Gardner.

13. From November 11, 1985, through April 3, 1986, both Phyllis Torbeck and Ruby Williamson were secretaries in the "secretarial pool".

14. Ray Ackerman counseled Phyllis Torbeck about overtime on January 14, 1986, at the request of Karen Cottrell.

15. While employed by the Defendant, Torbeck was paid additional compensation for overtime each [hour] she worked in excess of forty hours per week.

16. On April 2, 1986, Bruce Anderson and Ray Ackerman received a note from Phyllis Torbeck's obstetrician, Dr. James G. Cox.

17. Angus McQueen, Bruce Anderson, Ray Ackerman and William Winkler have no medical training.

18. Dr. Laura Mackie was not consulted by the Defendant prior to the discharge of Phyllis Torbeck.

19. Phyllis Torbeck was discharged by the Defendant on April 3, 1986.

20. On April 3, 1986, Phyllis Torbeck was pregnant.

21. Ray Ackerman, William Winkler, Angus McQueen and Bruce Anderson all took part in the decision to discharge Phyllis Torbeck.

22. All persons who took part in the decision to terminate Phyllis Torbeck are still employed by the Defendant.

23. Prior to discharging Phyllis Torbeck, the Defendant consulted its attorneys.

24. The attorneys who were consulted by the Defendant prior to Phyllis Torbeck's discharge are the same attorneys who are representing the Defendant in this action.

25. At the time of her discharge on April 3, 1986, Torbeck's base bi-weekly salary was $750.00.

26. From August 26, 1985, through October 6, 1985, Karen Cottrell, a secretary, worked between 31.25 and 33.25 hours per week.

27. For the week ending August 18, 1985, Karen Cottrell worked a total of 16.5 hours. A total of 23.25 hours was reported [as] "illness".

28. For the week ending August 25, 1985, Karen Cottrell worked a total of 10 hours. A total of 31 hours was reported as "illness".

29. Jeanette [Elliott] took time off for "illness" on Monday, Wednesday, Thursday and Friday of the week ending April 6, 1986.

30. Don Loewen was permitted time off for medical reasons from April 30, 1985, through June 7, 1985.

31. The Defendant received a Notice of Phyllis Torbeck's Charge of Discrimination by June 25, 1986.

32. The Defendant, by its attorneys, responded to the Charge of Discrimination on July 30, 1986.

33. The Defendant, by its attorneys, submitted an additional position statement on August 14, 1986.

34. On November 9, 1987, the EEOC requested additional information from the Defendant's attorneys.

35. On December 9, 1987, the Defendant, by its attorneys, provided additional information to the EEOC and a further position statement.

36. On January 5, 1987, and on January 21, 1987, the Defendant, by its attorneys, provided additional information to the EEOC.

37. On March 7, 1988, a settlement conference was held, by telephone, with the Defendant and its attorneys.

38. In April of 1988, the Defendant, by its attorneys, sent an inquiry to Harp Associates concerning Phyllis Torbeck's employment search.

39. The Defendant received Notice of the EEOC's Determination, with respect to Torbeck's discharge, on or about February 2, 1989. The notice includes a provision concerning the requirement to keep all relevant documents.

40. On March 24, 1989, the Defendant, by its attorneys, responded by letter, to the EEOC's determination with respect to Torbeck's charge.

41. The documents identified as Plaintiff's Exhibit 6 are true and correct copies of the time sheets for Karen Cottrell from August 11, 1985, through October 6, 1985.

42. The documents identified as Plaintiff's Exhibit 3 are true and correct copies of the time sheets of Ruby Williamson from December 1, 1985, through March 30, 1986.

43. The documents identified as Plaintiff's Exhibit 2 are true and correct copies of the time sheets of Phyllis Torbeck from December 1, 1985, through March 30, 1986.

44. The document identified as Plaintiff's Exhibit 1 is a true and correct copy of the letter written by Dr. Cox and submitted by Phyllis Torbeck to Ackerman, Hood and McQueen, Inc., management on April 2, 1986.

45. The document identified as Plaintiff's Exhibit 15 is a true and correct copy of the Notice of Charge of Discrimination received by the Defendant.

46. The document identified as Plaintiff's Exhibit 17 is a true and correct copy of the Defendant's July 30, 1986, response to the EEOC.

47. Plaintiff's Exhibits 1, 2, 3 and 6 are authentic copies of the Defendant's business records.

48. Exhibits 5 and 6 are authentic copies of the business records of the EEOC.

Pretrial Order sec. II, at 2-6.

The Court adopts the stipulations as part of its findings of fact and conclusions of law.

V. ADDITIONAL FINDINGS OF FACT

In addition to the stipulated facts listed above, the Court makes the following factual findings:

1. On January 10, 1986, Torbeck underwent a pregnancy test at Dr. Cox's office. The test was positive. At the time of the test, Torbeck was approximately five weeks pregnant. Shortly after she learned the results of the test, Torbeck announced her pregnancy to coworkers at AHM. A supervisory employee testified that she reacted to Torbeck's announcement by saying to herself: "Oh no, now we will never be able to fire her." Shortly after Torbeck's announcement, AHM management reviewed her job performance and for the first time criticized her work. The timing and circumstances of this review are highly suspicious because Torbeck had not been formally counseled prior to announcing her pregnancy. There is no credible testimony or documentary corroboration of any intent on the part of AHM to terminate Torbeck prior to the time she announced her pregnancy.

2. On February 13, 1986, Dr. Cox examined Torbeck. As a result of the examination, Cox concluded that Torbeck was in "good health," but that she was experiencing some fatigue and nausea. During March 1986, Torbeck experienced fatigue as a result of her

work, and headaches and lower back pain. Torbeck worked overtime in both February and March of 1986. The Court found credible Torbeck's testimony that she experienced discomfort during this time period and that she communicated the discomfort to coworkers.

3. On March 12, 1986, Dr. Cox again examined Torbeck.

4. Following the March 12, 1986, examination, Torbeck contacted Dr. Cox's office. Torbeck complained to a nurse of fatigue, headaches, and lower back pain.

5. During Torbeck's checkups on March 12 and April 11, Dr. Cox did not observe any signs or symptoms that indicated a high-risk pregnancy or a pregnancy with complications. Cox had no reason to believe that Torbeck was experiencing complications of the type that would threaten the well-being of either the mother or the fetus.

6. In a letter dated March 31, 1986, Dr. Cox wrote, in pertinent part:

> TO WHOM IT MAY CONCERN:
>
> RE: PHYLLIS TORBECK
>
> Mrs. Torbeck has been under my medical care since early in her current pregnancy. Her estimated due date is September 14, 1986.
>
> She is in good health, but because of her pregnancy, it is my recommendation that she not be required to work more than a 40 hour work week.
>
> Sincerely,
> /s/
> J. Gregory Cox, M.D.

Plaintiff's Exhibit No. 1.

7. When he wrote the letter, Dr. Cox believed Torbeck was in "good health." Cox explained that

Torbeck "wasn't physically sick or anything like that." At his deposition Cox could recall no complaints other than fatigue that Torbeck had reported as of the time he wrote the letter. At the time he wrote the letter, Cox did not know: (1) how much overtime Torbeck was working, or (2) whether the overtime she was working consisted of longer work days or longer work weeks. However, Torbeck had described her work routine and situation to Cox in general terms before he wrote the letter.

8. On April 2, 1986, Torbeck submitted her doctor's letter to AHM. Torbeck was discharged the next day, April 3, 1986, following a brief meeting with Bruce Anderson. Having already prepared a draft letter of discharge, Anderson sought at the meeting to determine only whether Torbeck intended to follow her doctor's recommendation.

9. AHM explored no alternative schedule changes with Torbeck, and sought to make no accommodation for her pregnancy.

10. When Torbeck indicated that she intended to follow her doctor's recommendation, AHM discharged Torbeck for the stated reason that she had failed to meet the terms and conditions of her employment, one of which was the necessity of working overtime. Raymond Ackerman, Bruce Anderson, William Winkler, and Angus McQueen participated in the decision to discharge Torbeck. As of the time of trial, all four men remained in the employment of AHM. None of these individuals had any medical training.

11. From January 14 through April 2, 1986, the AHM management did not counsel Torbeck about her job performance or about the adequacy of the hours she was working.

12. AHM did not discuss Torbeck's condition with her after management received Dr. Cox's letter,

and made no attempt to accommodate her request to work fewer hours. AHM did not consult with Cox prior to firing Torbeck.

13. Although the doctor's letter could have contained more detail, it clearly put AHM on notice of a medical recommendation by Torbeck's physician. Rather than make further inquiry about the circumstances giving rise to Dr. Cox's recommendation, AHM summarily discharged Torbeck after determining that she intended to follow her doctor's recommendation. The Court found to be credible Cox's testimony to the effect that he would not have made the recommendation had he not felt that it was medically appropriate.

14. The Court finds that Dr. Cox wrote the letter because he believed a slight reduction in work hours might alleviate or lessen Torbeck's pregnancy-related symptoms.

15. AHM neither advised Torbeck of any additional medical documentation that would be required for her to obtain a schedule adjustment nor told her that Dr. Cox's letter was insufficient.

16. At all times relevant to this litigation, AHM had no written policies governing medical leave, work schedule adjustments, leave for personal reasons, or other possible schedule accommodations to employees. AHM had no firm policy setting the length of time that an employee could be off work on medical or personal leave. The defendant did, however, as a practice permit an employee to take six weeks of paid maternity leave.

17. AHM treated Torbeck differently from other similarly situated employees because she was pregnant. Whether Torbeck is compared with employees who requested work schedule modifications for medical reasons, "medical necessity," or for no medical

reasons, it is clear to the Court that AHM took adverse action against Torbeck, and discriminated against her, because she was pregnant.

18. The evidence revealed that AHM granted work reductions to several nonpregnant employees who requested leave time and/or other schedule adjustments and accommodations.

19. The defendant used sick time, vacation time, and personal time to accommodate the requests of its employees for schedule adjustments. Jeanette Elliott used both personal time and sick time to enable her to undergo plastic surgery. Torbeck used both sick time and vacation time to enable her to schedule elective surgery in October 1985. AHM designated the type or types of leave to be used by an employee.

20. The defendant neither probed into the reasons for an employee's request for personal leave, nor required its employees to show medical necessity in order to be granted medical leave.

21. From October 14 through November 10, 1985, prior to her pregnancy, Raymond Ackerman granted Torbeck medical leave.

22. Torbeck's leave in October and November 1985 was not medically necessary. AHM did not threaten Torbeck with the loss of her job for making the request for a leave to enable her to schedule elective surgery.

23. Torbeck's job performance prior to, and after, January 10, 1986, was comparable to that of account service employee Ruby Williamson.

24. Karen Cottrell, a full-time employee of AHM, in 1985 was granted a schedule adjustment for emotional problems arising out of a domestic dispute. Cottrell was required neither to submit a physician's letter nor to make a showing of medical necessity in order to obtain the leave. Other employees who were

granted leave for medical reasons were not required to make the type of showing of need that Torbeck made, or the type of showing of medical need that AHM now contends was necessary. Similarly, AHM employees who took leave, or who requested schedule adjustments, for nonmedical reasons encountered a loose company policy toward such leave; the defendant liberally granted such requests.

25. Contrary to the defendant's contentions, Torbeck was not discharged because she refused to comply with the terms and conditions of her employment. The Court also rejects the defendant's efforts to paint Torbeck as a poor employee who was headed towards termination anyway; the testimony to this effect was uncorroborated by any credible documentation and the Court generally found testimony on this point lacking credibility. Specifically, the Court finds that after Torbeck announced her pregnancy, AHM, in a pretextual effort to establish a basis for its later action, "wrote up" Torbeck based upon complaints allegedly received over the preceding six weeks. The Court finds that the testimony concerning these so-called "complaints" lacks credibility.

26. The defense, in the Court's view, attempted to shift the focus of the trial from the conduct of AHM that followed Torbeck's announcement that she was pregnant to the conduct of Torbeck and her doctor. With the benefit of hindsight, Torbeck's doctor perhaps could have drafted a more artful letter. Following the receipt of Dr. Cox's letter, AHM easily could have made a reasonable inquiry about the basis of the letter. As a result, the company would have learned about the doctor's concerns, and would have been able to accommodate Torbeck's request.

27. Pregnancy itself is not considered an illness. However, the American College of Gynecology Technical Bulletin No. 58 lists three categories of possible recommendations regarding a woman's work sched-

ule during pregnancy. The possible recommendations: option No. 1 – continue to work without change; option No. 2 – continue to work with certain modifications in activity; and option No. 3 – discontinue work. In the Court's view, Dr. Cox's letter, coupled with reasonable inquiry by AHM management following the receipt of Cox's letter, should have triggered option No. 2.

28. Prior to April 1986, Torbeck did not complain to AHM management that her pregnancy was causing physical problems. Torbeck mentioned to coworkers during this time period that she was experiencing fatigue, but her comments to colleagues did not rise to the level of complaints to management. Dr. Cox's letter, however, put AHM management on reasonable notice that medical problems might arise if a schedule modification was not made.

29. In submitting the letter from her doctor to AHM, Torbeck went beyond the showing of medical need that had been made by other employees who had requested, and had been granted, medically related work schedule adjustments.

30. The Court will not punish Torbeck merely because her doctor arguably drafted the letter to her employer in an inartful, unlawyerlike way. An inquiry by AHM management would have revealed the medical basis for Dr. Cox's letter, and a reasonable accommodation could have been tailored to fit Torbeck's needs. The Court finds, contrary to AHM's contentions, that a medical basis for a schedule modification existed, that the medical basis was communicated to the defendant, that the requested accommodation was commensurate with Torbeck's general physical complaints, and that Torbeck was treated in a fashion dissimilar to the treatment of other employees in her attempt to gain a work schedule modification.

31. The Court further finds that because she was pregnant AHM discriminated against Torbeck by failing to accommodate her reasonable request for a work schedule modification and by firing her. The Court finds that AHM did not conduct the meetings with Torbeck immediately prior to her discharge with the intent of retaining her. Rather, AHM convened the meetings with Torbeck for the purpose of firing her. A discharge letter already had been prepared at the time the defendant instructed members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing.

32. Had Torbeck not requested a pregnancy-related schedule adjustment through her doctor, she would not have been fired on April 3, 1986. Contrary to AHM's contentions, Torbeck did not refuse to work overtime. During both February and March 1986, Torbeck's work records reflect overtime earnings. Had Torbeck remained in the employment of AHM, she would have received six weeks of paid maternity leave.

33. The Court also rejects the defense contention that Torbeck failed to mitigate her damages. Torbeck continuously sought alternative employment from April 3 through December 31, 1986.

34. As a result of her discharge from AHM, Torbeck lost wages and benefits. Her weekly base salary was $375. Under the EEOC's calculations, Torbeck's lost wages from the date of her discharge to the date of the birth of her baby, September 20, 1986, total $13,984; the interest totals $7,105.82. The total amount of Torbeck's lost wages and interest is $21,089.82. The Court finds these calculations appropriate.

VI. CONCLUSIONS OF LAW

A. Law Applicable in General to Claim of Pregnancy Discrimination Under Title VII

1. The EEOC alleged that AHM fired Torbeck because she was pregnant, a violation of Title VII. In general, Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms and conditions of employment, or benefits because of the person's sex.[4] An amendment, the Pregnancy Discrimination Act of 1978 ("the Act"), specifically defines discrimination on the basis of pregnancy, childbirth, or medical conditions related to pregnancy as unlawful sex discrimination under Title VII.[5] The Act states, in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the

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[4] 42 U.S.C. §2000e-2(a) (1988). The section states, in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin . . .

Id. (emphasis added).

[5] 42 U.S.C. §2000e(k) (1988). As a definitional section to Title VII, the Act provides no separate cause of action for discrimination on the basis of pregnancy. The Act defines pregnancy and related conditions as among the impermissible bases of discrimination outlined in §2000e-2. Title VII generally prohibits disparate treatment of employees on the basis of impermissible criteria such as pregnancy. *See, e.g., International Bhd. of Teamsters v. United States*, 431 U.S. 324, 334-36 & n.15 (1977) (disparate treatment "most obvious evil Congress had in mind" in enacting Title VII).

For a brief discussion of the legislative history of the Act, see *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646-47 (8th Cir. 1987) (broad purpose of Act was "to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy").

> basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

42 U.S.C. §2000e(k) (1988).

2. In a Title VII claim based upon indirect evidence of disparate treatment, the plaintiff must satisfy a threshold requirement of establishing a prima facie case.[6] The prima facie case that the Supreme Court outlined in *McDonnell Douglas Corp. v. Green* has become a model.[7] The Supreme Court intended the *McDonnell Douglas*-type prima facie case to give court guidance in assessing whether a Title VII plaintiff can present a minimal level of proof of discrimination.[8] A court should test the facts of a case under

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[6] A prima facie showing is not required in cases in which the plaintiff presents direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985). In this litigation, both parties proceeded under the assumption that a prima facie showing was required. The Court agrees that the EEOC's case involves indirect evidence.

[7] In *McDonnell Douglas*, the Supreme Court explained that a plaintiff may make a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted). Appellate courts adapt the model factors to cases involving allegations of other forms of discrimination, including discriminatory discharge. *See, e.g., Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1409 (10th Cir. 1984) (claim of discharge based upon national origin).

[8] The Supreme Court's summary of one purpose of the prima facie proof requirement: "The prima facie case serves an important function in the litigation:

an appropriate formulation of prima facie elements in order to determine whether the plaintiff's proof raises an inference of discrimination;[9] a court should not apply the factors mechanically.[10]

3. A court evaluates a Title VII plaintiff's indirect evidence under the Supreme Court's three-step, burden-shifting framework. The process progressively focuses the case on the alleged discrimination.[11] The Supreme Court has summarized the steps:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant " to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a prepon-

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(n. 8 continued)
it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

[9] The Supreme Court has explained:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the act.

Teamsters, 431 U.S. at 358.

[10] In a footnote to the statement of the model case, the Supreme Court wrote: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

[11] *Burdine*, 450 U.S. at 255 n.8. The process also "assures the plaintiff his day in court despite the unavailability of direct evidence, and entitles him to an explanation from the defendant-employer for whatever action was taken." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979).

derance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (U.S. 1981) (citations omitted). The burden on the plaintiff in step one, of proving a prima facie case, is "not onerous." *Id.* at 253. The intermediate burden on the defendant in step two, of presenting admissible evidence of a nondiscriminatory reason for the action taken against the employee, is a relatively light burden of production. *Id.* at 254-56. In step three, the plaintiff carries the burden of disproving the reason that the employer asserted for the action. *Id.* at 256. Through all three steps, a Title VII plaintiff retains the ultimate burden of persuasion, the burden of persuading the trier of fact that intentional discrimination occurred. *Id.* at 253.

B. Establishment of a Prima Facie Case of Discrimination

1. In the Tenth Circuit, a plaintiff may establish a prima facie case of discriminatory discharge by presenting evidence that satisfies the first three elements of the *McDonnell Douglas* test, and by producing evidence that the position at least remained available after the firing.[12] Under the basic Tenth

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[12] *Brown*, 746 F.2d at 1409-10 (citing *Crawford v. Northeastern Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983). The exact formulation of the elements of the prima facie proof was one of the areas of dispute in the litigation.

The EEOC proposed that the Court evaluate its prima facie case as a discriminatory denial of benefits claim. The EEOC proposed as prima facie factors: (1) "membership in a protected class"; (2) "entitlement to a benefit"; and "denial of the benefit while the benefit is granted to others *or* differential processing of entitlement." Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law para. 13, at 12 (filed Jan. 11, 1991) (emphasis original).

AHM proposed a more stringent version of the basic elements for testing a discriminatory discharge claim. AHM proposed as prima facie elements:

Circuit factors, a plaintiff may establish a prima facie case of discriminatory discharge by showing: (1) that the employee was a member of a group protected by Title VII; (2) that the employee was qualified for the job; (3) that the employee was fired despite his or her qualifications for the job; and (4) that after the employee was discharged, either the employer filled the job or the position remained available.[13]

2. Even in the absence of proof under the final element, the EEOC established a prima facie case that AHM discharged Torbeck because she was pregnant. The EEOC did not provide evidence that Torbeck was replaced or that her position remained available. However, the EEOC has presented evidence that would satisfy even some of the more stringent formulations of Title VII prima facie cases.[14]

(n. 12 continued)

> (1) the employee was a member of a protected class; (2) she was discharged; (3) she was qualified for, and adequately performed, her job at the time of her discharge; and (4) other similarly situated employees with comparable qualifications and work record who were not members of the protected class were not discharged, or the defendant replaced her or sought to replace her with someone of equal qualifications who was not a member of the protected class.

Trial Brief of Defendant, Ackerman, Hood and McQueen, Inc., at 8-9 (filed Nov. 28, 1990) [hereinafter AHM's Trial Brief].

[13] Under the Tenth Circuit's statements of the fourth element, a showing either that the fired employee's position remained available or that the employer filled the position may establish a prima facie case. *See Brown*, 746 F.2d at 1409-10; *Crawford*, 713 F.2d at 588. The variations in the Circuit's statements of the element illustrate that formulations of prima facie cases are flexible.

[14] In *Brown*, the Tenth Circuit applied a similar analysis in a case in which the plaintiff had not presented evidence that "her job remained available after her discharge." *Brown*, 746 F.2d at 1410. The approach is consistent with the Supreme Court's admonition that the four *McDonnell Douglas* factors "were not cast as a rigid rule to apply to all factual situations." *McDonnell Douglas*, 411 U.S. at 1409. After scrutinizing a plaintiff's evidentiary offerings, a court may allow a plaintiff to proceed if the evidence demonstrates merely a "potential for a prima facie case at trial." *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86-87 (5th Cir. 1982), *quoted in Brown*, 746 F.2d at 1410.

3. The EEOC has established the first and third elements of the prima facie case. Torbeck was a member of a protected class under Title VII because when she was fired she was approximately four months pregnant. *See* 42 U.S.C. § 2000e(k).

4. The EEOC has established the second element of the prima facie case by showing objective evidence that Torbeck was qualified for, and was performing, her job. For purposes of a prima facie case, a court should consider only employee qualifications that may be measured objectively. *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1344-45 & n.8 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *see also Legrand v. Trustees of Univ. of Ark. at Pine Bluff*, 821 F.2d 478, 481 (8th Cir. 1987) (in a prima facie case, plaintiffs needed only show "objective" job qualifications), *cert. denied*, 485 U.S. 1034 (1988). Torbeck had worked as a secretary for the firm for more than a year.[15] Under the objective evidence, Torbeck was qualified to work as a secretary and was performing her job as a secretary.[16]

5. The EEOC has produced sufficient evidence of disparate treatment to raise an inference that AHM discharged Torbeck because she was pregnant. The EEOC's principal evidence that established a prima facie case included: (1) that the AHM management began criticizing Torbeck's work after she an-

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[15] The Court also considered that Torbeck was not on formal probation, as well as her testimony that she had not been "counseled" prior to her pregnancy, and that she had been working overtime. Affidavit of Phyllis Kay Torbeck paras. 8, 13 (filed Dec. 17, 1990).

[16] In arguing that the EEOC did not establish a prima facie case, AHM asserted that Torbeck was not adequately performing her job because she was refusing to work overtime. Whether Torbeck refused to work overtime was one of the disputed factual issues in the case; the Court eventually decided the issue in the employee's favor. The argument was based upon a subjective evaluation of AHM's evidence, and properly was addressed at the third stage. *See Lynn*, 656 F.2d at 1344-45 & n.8 (basic objective criteria are addressed in prima facie case).

nounced that she was pregnant; (2) that AHM fired Torbeck when she sought to reduce her work schedule to 40 hours a week; (3) that AHM liberally accommodated other employees' requests for leaves and schedule adjustments under an unwritten policy; and (4) that in response to Torbeck's request for reduced working hours AHM management applied a higher standard, medical necessity, than it applied to other employees' requests for leave and schedule adjustments. In summary, the EEOC has presented sufficient evidence from which one could infer, in the absence of another explanation, that because after she became pregnant Torbeck was treated differently than other employees were treated, she was discharged because she was pregnant.

6. For the purposes of a prima facie case based upon a disparate treatment argument, the EEOC made comparisons between Torbeck and "similarly situated" employees.[17] AHM argued that the prima facie case failed because the EEOC produced no evidence that compared Torbeck's firing to "similarly situated" AHM employees who were retained under similar circumstances. A claim may fail if the evidence of disparate treatment presented in the prima facie showing does not involve "similarly situated" or comparable employees.[18] In Torbeck's case,

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[17] In discussing the assignment of burdens of production and persuasion in a Title VII case, the Supreme Court in *Burdine* stated: "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." *Burdine*, 450 U.S. at 258. The reference in Burdine to comparisons with "similarly situated" employees referred to a discussion in *McDonnell Douglas* about the plaintiff's burden in *step three* of disproving the employer's asserted nondiscriminatory reason. *See McDonnell Douglas*, 411 U.S. at 804.

[18] *See, e.g., Hughes v. Chesapeake & Potomac Tel. Co.*, 583 F. Supp. 66, 70 (D.D.C. 1983) (plaintiff did not provide prima facie case of race discrimination

a comparison with "similarly situated" employees was not difficult; the EEOC compared AHM's treatment of Torbeck with the firm's treatment of other AHM employees who were subject to the same unwritten policy governing leaves and work schedule adjustments.

7. The EEOC established a prima facie case in support of the discriminatory discharge claim by presenting sufficient evidence from which the Court could infer intentional discrimination on the basis of Torbeck's pregnancy. Because the EEOC established a prima facie case, a presumption arose that AHM unlawfully discriminated against Torbeck. *See Burdine*, 450 U.S. at 254.

C. Defendant's Burden of Articulating a Nondiscriminatory Reason for the Discharge

1. If a Title VII plaintiff established a prima facie case, the defendant must produce evidence of a nondiscriminatory reason for the job action in order to prevent an adverse judgment. A defendant's burden in rebutting the presumption of unlawful discrimination is one of production; a defendant is not required to persuade a court that it actually was motivated by the asserted reason. *Burdine*, 450 U.S. at 254-56. If a defendant satisfies its burden, the presumption of discrimination created by the prima facie case is eliminated. *Id.*

2. The defendant carried its burden of rebutting the EEOC's prima facie case by offering testimony that AHM management discharged Torbeck for insubordination, or, for refusing to satisfy a condition of her employment that she work overtime. Insubordination is a legitimate, nondiscriminatory reason for a firing. *See, e.g., Nulf v. International Paper Co.*,

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(n. 18 continued)
in part because she did not show "that other employees with similar work and attendance records, who were not members of a racial minority, were not terminated").

656 F.2d 553, 559 (10th Cir. 1981). AHM's proffered reason satisfied the requirement because it created a genuine question of fact as to whether the employer discharged Torbeck for discriminatory reasons. *See Burdine*, 450 U.S. 254-55.

D. Plaintiff's Burden to Prove Discrimination

1. If a Title VII defendant carries the intermediate burden, the plaintiff bears the burden of proving by a preponderance of the evidence that the employer's actions were discriminatory. In general, a plaintiff may attempt to prove discrimination by showing either that the reason offered by the employer merely was a pretext for discrimination or that the plaintiff was the victim of disparate treatment. *Nulf*, 656 F.2d at 559.

2. A plaintiff is not required to prove that unlawful discrimination was the sole basis for the employer's actions. The plaintiff must show only that "but for" the unlawful motive the employer would not have taken the action. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (in Title VII race discrimination case, "no more is required to be shown than that race was a 'but for' cause.").

3. A Title VII plaintiff may prove in at least two ways that the stated reason for the job action was a pretext for discrimination. The plaintiff may prove pretext either (1) "directly by persuading the court that a discriminatory reason more likely motivated the employer," or (2) "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Here, the EEOC has persuaded the Court in both of these ways. Among the evidence that may be relevant to proving pretext in a claim of discharge on the basis of pregnancy is: the

employer's reaction, if any, to the employee's pregnancy; the employer's treatment of the employee before and after the pregnancy began; and the employer's policies concerning employee pregnancy.[19]

4. The EEOC proved by a preponderance of the evidence that the reason that AHM advanced for firing Torbeck, insubordination, was a pretext for discrimination.[20] Viewed as a whole, the evidence showed both that the proffered reason was not credible and that Torbeck's pregnancy likely was at least part of AHM's motivation for firing her. AHM has justified firing Torbeck by asserting that she had refused to work overtime, one of the conditions of her employment. After weighing the evidence, the Court concluded that the proffered reason lacked credibility partly because the firing fit a pattern of adverse actions taken by management against Torbeck that began shortly after she announced her pregnancy. Despite a liberal policy of granting schedule accommodations to its employees, AHM made no attempt to accommodate Torbeck's request. AHM's management declared the doctor's letter insufficient to support need, but neither made further medical inquiry on its own nor allowed Torbeck the opportunity to obtain additional evidence of need. AHM held Torbeck's request to a higher standard than it normally applied to requests for schedule adjustments. The evidence, beginning with the timing of the "counseling" session, indicates that Torbeck would not have been discharged had she not become pregnant. Con-

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[19] *See McDonnell Douglas*, 411 U.S. at 804-05. While the Supreme Court listed similar factors as potentially relevant to proving pretext in a claim of racial discrimination, they are factors that may be relevant in proving pretext in many types of cases.

[20] The reasons that AHM proffered for discharging Torbeck are discussed in the findings of fact. Insubordination was the paramount reason.

sidering the evidence as a whole, the EEOC has shown that the reason given for the firing, insubordination, was pretextual.

5. The EEOC proved by a preponderance of the evidence that AHM did not evaluate Torbeck's request for reduced hours on the same basis that it evaluated similar requests by similarly-situated, nonpregnant employees. Torbeck was entitled to nondiscriminatory consideration of her request for a work schedule reduction.[21] The EEOC demonstrated that AHM usually liberally granted schedule accommodations under an unwritten policy; AHM measured Torbeck's request against a standard of medi-

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[21] *See Hishon v. King & Spalding*, 467 U.S. 69, 75-76 (1984) (under Title VII "benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion" even if the employer is not required to provide the benefit).

See also Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Nos. 5, 6, at 205 (1990). The question and answer section in the *Code of Federal Regulations* concerning the Pregnancy Discrimination Act explains that a pregnant employee's request for benefits based upon her physical condition must be processed the same as any other employee's request.

> 6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?
>
> A. An *employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work*. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

Id. (emphasis added).

cal necessity. In addition, AHM made no attempt to accommodate Torbeck through the variety of means typically offered to other employees. When Torbeck asked for an accommodation, instead of denying the request or making further inquiry, AHM fired her. Considered as a whole, the evidence showed that AHM treated Torbeck differently than other employees.

6. In Torbeck's case, AHM did not follow its previous practice for considering employees' requests for leave or schedule adjustment. AHM described its unwritten policy as one of *evaluating* employees' requests for schedule adjustments on a case-by-case basis and of *attempting to accommodate* each employee's request. AHM attempted to accommodate other employees' requests for schedule adjustments with a combination of sick time, personal leave time, and vacation time; AHM did not offer the same alternatives to Torbeck. Torbeck's supervisors neither investigated her medical condition nor advised her that they did not view the letter from her physician as a satisfactory basis for a schedule adjustment. In summary, AHM neither seriously evaluated Torbeck's medical condition nor made an attempt to accommodate her request.

7. In attempting to prove that Torbeck was subject to disparate treatment, the EEOC made comparisons between Torbeck and "similarly situated" employees. The comparisons were appropriate in this case partly because all of the employees were subject to the same unwritten leave and schedule adjustment policies.

8. AHM's assertion that Cox's letter did not demonstrate medical necessity was pretextual. While fatigue, nausea, lower back pain, and headaches are common symptoms of pregnancy, the symptoms vary with the individual. The expert witnesses agreed that physicians generally recommend rest to alleviate

such symptoms of pregnancy. Torbeck's request for reduced hours was in general terms a typical, reasonable request by a pregnant employee. Without any investigation, AHM could not reasonably have determined whether and to what extent some accommodation was warranted in Torbeck's case.[22] Title VII does not place on the employer a burden to investigate a pregnant employee's physical condition; however, AHM's failure to make any effort to clarify Cox's recommendation was evidence of conduct that the Court considered as relevant to AHM's motives. Also significant was the evidence that AHM had not required a showing of medical necessity in considering other requests for medically related leaves and schedule adjustments.

9. The EEOC has shown by a preponderance of the evidence that "but for" Torbeck's pregnancy, AHM would not have discharged her. Having concluded that AHM's stated reason for the discharge, insubordination, was pretextual and lacked credibility, the Court also has concluded that the surrounding circumstances support an inference of discrimination. Within days after she announced at work that she was pregnant, AHM for the first time formally "counseled" Torbeck about her attitude toward working overtime and criticized her work. When Torbeck submitted a letter from a doctor that indicated that she should work not more than a 40-hour week, she was almost summarily discharged. The EEOC has persuaded the Court that the AHM management han-

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[22] The employer's failure to make any serious attempt to investigate the letter merely was one factor in the Court's conclusion that the defendant's "medical necessity" argument was pretextual. An investigation of Torbeck's request could have taken many forms, and the type is relatively unimportant. For example, AHM management could have discussed with Torbeck its doubts about the validity of the letter and about the necessity of her request. Under a different set of facts, even an employer's extensive investigation of a similar letter might not outweigh the evidence that the stated reason for the discharge was pretextual.

dled Torbeck's application for a schedule adjustment differently than it handled other employees' similar requests. Considering testimony such as the timing of the counseling session, management's reaction to her doctor's letter, and the timing of her firing soon after she requested a reduction in hours, the Court has concluded that AHM would not have fired Torbeck had she not become pregnant. The evidence showed no convincing reason for the treatment that Torbeck received other than her pregnancy.

E. Other Conclusions of Law.

1. The discrimination against Torbeck was possible partly because of the broad discretion possible under AHM's unwritten policies concerning employees' requests for leave and schedule adjustments. Unwritten policies may become "tools of discrimination" because they allow for highly discretionary enforcement. *Dunning v. National Indus., Inc.*, 720 F. Supp. 924, 931-32 (M.D. Ala. 1989). The evidence showed that AHM liberally granted other employees' request for leaves and reduced work schedules. In Torbeck's case, AHM management applied a stricter policy, requiring a higher quality of proof of her medical condition than it required of other employees. Though management seemingly was dissatisfied with the quality of Torbeck's proof of need, no policy was available to inform her of what type of proof of medical need would be sufficient.

2. A pregnant employee is not required to show medical necessity in order to fall within the protection of Title VII.[23] The concept of requiring an em-

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[23] AHM argued that as part of a prima facie case the EEOC was required to show that Torbeck had been qualified to obtain the benefit by demonstrating that a reduced schedule was medically necessary. The cases that AHM cited do not support the blanket contention that a plaintiff must show medical necessity in order to obtain leave or other benefits. *See, e.g., EEOC v. Southwestern Elec. Power Co.*, 591 F. Supp. 1128, 1133-34 (W.D. Ark. 1984) (plaintiff did not prove need

ployee to show "medical necessity" is not found in the language of the statute, and the Court declines the defense invitation to judicially augment this legislation. A court's proper role in a Title VII case involving an allegation of discrimination on the basis of pregnancy is to determine whether the employer's actions were discriminatory. A court's role is not to attempt determine [sic] the physical capacity to work of a particular pregnant employee. *See EEOC v. Southwestern Elec. Power Co.*, 591 F. Supp. 1128, 1132 (W.D. Ark. 1984) (court's role is to determine whether sex discrimination occurred, not "how long it takes to recover from having a baby").

3. The EEOC did not unreasonably delay in processing Torbeck's charge of discrimination. In general, in order to bar the EEOC prosecution of the case the Court would have had to find an inexcusable delay that resulted in undue prejudice to AHM. *See, e.g., EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202 (11th Cir. 1982).

4. Torbeck made a diligent search for employment from April 3, 1986, through December 3, 1986. The EECO stated that Torbeck stopped actively looking for employment as of December 31, 1986.

5. Any finding of fact that is more properly considered as a conclusion of law shall be deemed to be a conclusion of law, and any conclusion of law that is more properly deemed a finding of fact shall be deemed a finding of fact.

F. Relief

1. Under Title VII, a court has "considerable leeway" to tailor relief to the facts of a case. *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267 n.1 (10th Cir. 1975); *see also* 42 U.S.C. §2000e-5(g). Whether to

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(n. 23 continued)
for additional maternity leave under employer's policy that required adequate medical proof). The Court has found in this case that AHM did not uniformly require proof of medical necessity.

award monetary compensation, including back pay and attorney fees, is within the discretion of a trial court, and is subject to review only under an abuse of discretion standard. *Taylor*, 524 F.2d at 267, 268.

2. Torbeck is entitled to an award of lost earnings and interest in the amount of $21,089.82.

3. An injunction will issue against AHM in order to prevent further discriminatory treatment of its pregnant employees. Upon a finding of an intentional, unlawful employment practice, Title VII authorizes a court to enjoin an employer from engaging in the practice. 42 U.S.C. §2000e-5(g). The EEOC has asked the Court (1) to enjoin AHM from violating Title VII, and (2) to direct AHM to develop and implement a nondiscriminatory, written policy concerning leaves and schedule adjustments. The EEOC's injunctive request is granted.

4. The Court will award costs and attorney fees, if appropriate, upon proper application.

VII. CONCLUSION

The EEOC has proven by a preponderance of the evidence that Torbeck would not have been fired had she not been pregnant. Beginning with her announcement that she was pregnant, the evidence showed a pattern of events from which the Court concluded that Torbeck's employer treated her differently because she was pregnant. The reason that her employer gave for firing Torbeck, insubordination, lacked credibility; the EEOC proved that the proffered reason merely was pretext for discrimination.

Counsel for the EEOC shall prepare and file not later than February 28, 1991, an entry of judgment, including an injunctive order, consistent with this Order and approved only as to form by counsel for AHM.

IT IS SO ORDERED THIS 20TH DAY OF FEBRUARY 1991.

/s/ LAYN R. PHILLIPS

Layn R. Phillips
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-90-727-P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

ACKERMAN, HOOD & MCQUEEN, INC.,
Defendant.

[Filed Mar. 5, 1991]

JUDGMENT

This Court, having heard the evidence and observed the witnesses in the captioned matter and finding that the Defendant, Ackerman, Hood & McQueen, Inc., discriminated against the Charging Party, Phyllis K. Torbeck, because of her pregnancy in violation of Title VII of the Civil Rights Act of 1964, as amended, hereby orders that a JUDGMENT be entered in favor of the PLAINTIFF. It is further ORDERED as follows:

1. Ackerman, Hood & McQueen, Inc. (hereinafter, "the Defendant") shall be enjoined from discriminating against any employee in any manner related to her employment because of pregnancy.

2. The Defendant shall prepare a non-discriminatory written policy concerning leaves and schedule adjustments.

3. The Defendant shall pay to Phyllis Torbeck the amount of $21,089.82 in back wages and interest.

4. The net back wages amount shall be paid by certified check made out to Phyllis K. Torbeck. The

check shall be sent by certified mail, return receipt requested, to Ms. Torbeck at 11344 Markwell, Oklahoma City, Oklahoma 73132.

5. A copy of the certified check described above shall be sent to the Regional Attorney of the Dallas District Office of the Commission.

6. The Defendant shall withhold Federal and state income taxes and the employee's portion of social security taxes from the back wage amount and send to Phyllis Torbeck an IRS Form W-2 for 1991.

All of the requirements set forth in Paragraphs 1 through 6 above shall be performed on or before 20 days from the entry of this JUDGMENT.

ENTERED on the 5th day of March, 1991.

/s/ LAYN R. PHILLIPS

LAYN R. PHILLIPS, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

ENTERED IN JUDGMENT DOCKET ON
3-5-91

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-6116

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

ACKERMAN, HOOD & MCQUEEN, INC.,
Defendant-Appellant.

[Filed Feb. 10, 1992]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-727-P)

Submitted on the briefs:

Donald R. Livingston, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Carolyn L. Wheeler, Assistant General Counsel, and Susan L.P. Starr, Washington, D.C., for Plaintiff-Appellee.

Stephen P. Friot and Barbara L. Swimley of Spradling, Alpern, Friot & Gum, Oklahoma City, Oklahoma, for Defendant-Appellant.

Before LOGAN AND BARRETT, Circuit Judges, and KELLY,** District Judge.

BARRETT, Circuit Judge.

** Honorable Patrick F. Kelly, District Judge, United States District Court for the District of Kansas, sitting by designation

Defendant Ackerman, Hood & McQueen (AHM) appeals from a judgment entered in favor of Plaintiff Equal Employment Opportunity Commission (EEOC) on claims the EEOC brought on behalf of Phyllis Torbeck pursuant to the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k). Following a two-day bench trial, the district court determined AHM violated the PDA, and thus Title VII, when it fired Phyllis Torbeck due to her pregnancy. *EEOC v. Ackerman, Hood & McQueen, Inc.*, 758 F. Supp. 1440, 1453 (W.D. Okla. 1991). We affirm.[1]

FACTS

AHM is an advertising agency located in Oklahoma City, Oklahoma. In December 1984, the company hired Phyllis Torbeck as an executive secretary. When she was hired, she was told the position would require some overtime. For the first ten months of her employment, she worked almost exclusively for Ray Ackerman. In the fall of 1985, Torbeck requested and received leave to undergo elective surgery to enable her to become pregnant. When she returned from leave on November 11, 1985, she was assigned to a newly devised secretarial pool.

On January 10, 1986, Torbeck learned she was pregnant. Shortly thereafter, she announced her pregnancy to her supervisor and coworkers. Prior to this time, she had not received any negative performance reviews. On January 14, however, she was "counseled" for the first time about her job performance. Specifically, she was criticized for her attitude with regard to working overtime. In the period

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

between January 10, 1986, and her termination, Torbeck worked anywhere from zero to eight and three quarters hours overtime per week.

Although Torbeck was in good health, she experienced many of the typical symptoms associated with pregnancy. These included fatigue, nausea, and headaches. Dr. James Cox, Torbeck's obstetrician, noted these symptoms when he examined her in February of 1986. At trial, Torbeck testified that she told some of her coworkers about the discomfort she was experiencing.

Following an office visit to Dr. Cox on March 12, Torbeck contacted one of his nurses by phone. She stated she was experiencing significant lower back pain, as well as headaches and fatigue. In response to that phone conversation, Dr. Cox wrote the following letter, dated March 31, 1986.

> TO WHOM IT MAY CONCERN:
> RE: PHYLLIS TORBECK
>
> Mrs. Torbeck has been under my medical care since early in her current pregnancy. Her estimated due date is September 14, 1986.
>
> She is in good health, but because of her pregnancy, it is my recommendation that she not be required to work more than a 40 hour work week.
>
> Sincerely,
>
> /s/
>
> J. Gregory Cox, M.D.

At trial, Dr. Cox testified that although Torbeck showed no signs of having a high-risk pregnancy, he believed a slight reduction in work hours might alleviate her symptoms. At the time he wrote the letter, Dr. Cox was not aware of the specific amount of overtime Torbeck was working. He was aware of her work situation in general terms.

On April 2, Torbeck submitted the letter to AHM management. On the morning of April 3, she was called to a meeting with AHM officer Bruce Anderson. He asked her whether she intended to follow her physician's recommendation. She stated she would. Although Torbeck did not know it, Anderson already had prepared a termination letter. Later in the day, she was summarily discharged. AHM stated she was terminated for insubordination because she refused to work overtime.

At the time of Torbeck's discharge, AHM had no written policies governing either medical or personal leave. At various times in the company's history, however, employees had requested leave or work schedule adjustments. These requests were always granted. At no time was any employee required to show medical necessity in order to obtain leave or a schedule adjustment.

Specifically, the company allowed one employee to use a combination of sick time and personal leave to allow her to undergo plastic surgery. Torbeck was allowed to take leave when she underwent elective surgery in the fall of 1985. A third employee received a schedule modification allowing her to work less than forty hours a week when she was having personal and emotional problems.

Following a bench trial, the district court made extensive legal and factual determinations, concluding that AHM discriminated against Torbeck because of her pregnancy in violation of Title VII. The court ruled AHM treated Torbeck's schedule modification request differently because she was pregnant, and would not have fired her absent that pregnancy. *See* 758 F. Supp. at 1448. In this appeal, AHM asserts two general grounds for overturning the district court's decision. These include 1) that the court misinterpreted the PDA and, therefore, misapplied it, and 2) that the court's findings of fact are clearly erroneous.

Discussion

I. *Standard of Review*

Our review of the district court's factual findings is limited to determining whether they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983). In contrast, we review all legal issues de novo. *Northern Natural Gas Co. v. Grounds*, 931 F.2d 678, 681 (10th Cir. 1991); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 152 (1st Cir. 1990).

II. *The Pregnancy Discrimination Act*

The PDA emanates from Title VII, which, among other things, makes it unlawful to discriminate against any individual with respect to terms, conditions, or privileges of employment based on the employee's sex. *See* 42 U.S.C. §2000e-2(a)(1). The PDA was added to the definitional section of Title VII in 1978. It states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. §2000e(k).

The section was added to Title VII "to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy." *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987). The immediate goal of the statute was to overturn *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that a pregnancy-related exclusion in an employee disability plan did not violate

Title VII. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 678-79, & nn.12-17 (1983)(citing legislative history). "The Reports, debates, and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers." *California Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 285-86 (1987). It is with these goals in mind that we consider the issues presented in this appeal.

III. *Application of the PDA*

AHM contends the district court misapplied the PDA in several respects. Specifically, the company contends 1) that the court erred in comparing AHM's treatment of Phyllis Torbeck with employees who were not similarly situated, 2) that the court erred in failing to compare Torbeck with a male employee, and 3) that the court inappropriately injected reasonableness into its disparate treatment analysis. We address these arguments in turn.

Claims made under the PDA are analyzed under the disparate treatment analysis applied in Title VII cases.[2] *See, e.g., Beck,* 708 F.2d at 534-36 (applying disparate treatment analysis); *Carney,* 824 F.2d at 647 (district court applying disparate treatment analysis in claim made under the PDA). Using this analysis, the district court concluded that the EEOC made out a prima facie case of discrimination. *See* 758 F. Supp. at 1452. It was then incumbent upon AHM to satisfy its burden of production to rebut the presumption of illegal termination. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254-56 (1981). The company's proffered justification for the termina-

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[2] The analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), is appropriate where, as in this case, there is no direct evidence of discrimination. *See Carney,* 824 F.2d at 648 (*McDonnell Douglas* test is inappropriate where there is direct evidence of discrimination).

tion, insubordination, satisfied that burden. *See Nulf v. International Paper Co.*, 656 F.2d 553, 559 (10th Cir. 1981) (insubordination constitutes a valid, nondiscriminatory reason for termination).

The pertinent issue in this appeal is whether AHM's alleged justification is merely a pretext for discrimination.[3] *See Burdine*, 450 U.S. at 253, 256. In this regard, the plaintiff carries the ultimate burden of persuasion to prove intentional discrimination occurred. *See Cumpiano*, 902 F.2d at 153. "A plaintiff may succeed in a Title VII action 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " *Luna v. City & County of Denver*, 948 F.2d 1144, 1148 (10th Cir. 1991) (quoting *Burdine*, 450 U.S. at 256).

We turn now to the district court's application of the PDA in the context of the disparate treatment analysis outlined above. The Act requires courts to inquire whether the employer treats pregnancy or pregnancy-related conditions differently than other medical conditions. *See Newport News*, 462 U.S. at 684 ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."). Thus, the district court applied the statute correctly when it compared Torbeck's treatment to other employees requesting accommodations under AHM's unwritten policy.

We reject AHM's suggestion that the district court committed legal error because it did not compare Torbeck's treatment under the leave policy with

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[3] AHM has conceded that the EEOC carried its burden of establishing a prima facie case. *See* Appellant's Br. at 21 n.6. Thus, our consideration is limited to determining whether the EEOC carried the ultimate burden of showing intentional discrimination occurred.

that of her male coworkers. The clear language of the PDA requires the court to compare treatment between pregnant persons and "other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). The comparison is, therefore, between pregnant and nonpregnant workers, not between men and women. AHM's argument to the contrary lacks merit. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 248 (1989)("We have not ... required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men." . . .).

Furthermore, each of the employees compared under the policy were similarly situated in that they requested leave or work schedule adjustments to accommodate their personal needs. In each case, the company granted the request without requiring further medical necessity. AHM contends these employees were not similarly situated because, unlike Torbeck, a doctor had not certified they were in "good health." Thus, they were not similar in their ability or inability to work. This argument is unconvincing. In essence, AHM is asserting that despite a history of never inquiring into the actual physical condition of employees requesting leave, it should have been able to do so in Torbeck's case merely because she was pregnant. The PDA was enacted specifically to prevent this type of dissimilar treatment.

IV. *Review of the District Court's Factual Findings*

Finally, AHM takes issue with certain of the district court's factual findings. Although couched in a legal argument, AHM is really seeking a review of the district court's factual determinations. Specifically, the company argues the court erred in 1) finding that Torbeck's request was "reasonable," 2) in finding that AHM made no additional inquiry of Torbeck's medical situation prior to terminating her,

and 3) in placing emphasis on the facts indicating that a termination letter was prepared prior to Torbeck's meeting with Bruce Anderson. These findings are not clearly erroneous. Further, they are indicative of the company's state of mind. "[AHM's] mindset is directly relevant to whether their proffered reason for [terminating Torbeck] is mere pretext." *Luna*, 948 F.2d at 1148. The district court did not err in relying on these findings, which are fully supported in the record.

In addition, the company urges that the facts taken as a whole do not support a finding of sex discrimination pursuant to the PDA. This argument necessarily invites a review of the record to determine whether the district court's findings are clearly erroneous. They are not.

The record shows that prior to announcing her pregnancy, Torbeck was not counseled about her job performance. Within days of her announcement, however, management criticized her work. Further, after she submitted her physician's letter, she was almost summarily discharged. The company made no further inquiry of her or her physician to determine what her needs were. There was absolutely no effort to accommodate Torbeck, despite a history of doing just that for employees with other medical concerns. There is ample evidence in the record to support the district court's findings that AHM discriminated against Torbeck because of her pregnancy.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

(2)

No. 91-1805

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ACKERMAN, HOOD & MCQUEEN, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly found that petitioner violated Title VII by discharging one of its employees because of her pregnancy-related request for a work-schedule adjustment, where petitioner liberally and routinely granted such schedule adjustments to similarly situated non-pregnant employees as a benefit of employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Carney v. *Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987)	14
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	9
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	4, 5
Newport News Shipbuilding & Dry Dock Co. v. *EEOC*, 462 U.S. 669 (1983)	8
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	9
United States v. *Johnston*, 268 U.S. 220 (1925)	9

Statutes and regulation:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	4, 13
Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k)	2, 4, 6, 8, 11, 14
29 C.F.R. Pt. 1604 App.	9

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. C1-C9, is reported at 956 F.2d 944. The opinion of the district court, Pet. App. A1-A34, is reported at 758 F. Supp. 1440.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1992. The petition for a writ of certiorari was filed on May 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an advertising, marketing and public relations firm located in Oklahoma City, Oklahoma. This case arises out of petitioner's treatment and discharge of one of its secretaries, Phyllis Torbeck. The district court found that petitioner violated Title VII, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), by discriminating against Torbeck because she was pregnant, and that Torbeck's discharge resulted from the violation. Pet. App. A1-A34. It awarded Torbeck back wages and enjoined petitioner from further violations; it also required petitioner to create and implement a nondiscriminatory written policy regarding leave and schedule adjustments. Pet. App. A33. The court of appeals affirmed. Pet. App. C1-C9.

1. Petitioner hired Torbeck as a secretary in 1984. When Torbeck discovered she was pregnant in early 1986, she informed her immediate supervisor, Karen Cottrell. Pet. App. A6, A10. Although Torbeck experienced some fatigue and nausea at the beginning of her pregnancy, she did not complain to her supervisors. She did, however, mention it to a co-worker. Pet. App. A10-A11, A14. But by March 1986, Torbeck's fatigue had worsened; she also experienced headaches, lower back pain, and general discomfort. As a result, Torbeck's obstetrician, Dr. James G. Cox, wrote a letter in which he recommended that Torbeck "not be required to work more than a 40 hour work week" during her pregnancy. Pet. App. A10, A11. At the time Dr. Cox wrote the letter, he believed that Torbeck was "in good health" and so indicated in the letter. But he also believed that reducing Torbeck's work hours would alleviate her pregnancy-related symptoms. Pet. App. A11-A13.

On April 2, 1986, Torbeck submitted her doctor's letter to petitioner's management and requested that she not be required to work overtime. The next day, Bruce Anderson, one of petitioner's officers, called Torbeck to a meeting. Although Anderson had already prepared a draft letter of discharge for Torbeck, he asked Torbeck if she intended to follow her physician's recommendation by limiting her work to 40 hours per week; Torbeck said that she did. Pet. App. A12. Neither Anderson nor any of petitioner's other employees asked Torbeck about her condition; nor did anyone attempt to contact Dr. Cox. Pet. App. A12-A13. Indeed, petitioner deliberately avoided learning more of Torbeck's condition, "instruct[ing] members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Later that day, petitioner summarily fired Torbeck. Pet. App. A12.

In contrast to petitioner's treatment of Torbeck's pregnancy-related request for a schedule adjustment, petitioner liberally granted similar requests made by employees who were not pregnant. Pet. App. A14-A15. For instance, while Karen Cottrell was a secretary, petitioner granted her a schedule adjustment on account of emotional problems. Although Cottrell's adjustment was greater than the one requested by Torbeck—Cottrell's hours dropped to approximately 30-33 hours per week, *ibid.*, well below the 40 hours per week Torbeck requested—petitioner did not request that Cottrell submit a doctor's note; it simply granted the request. Pet. App. A14. Similarly, petitioner permitted Jeanette Elliott to use both sick leave and personal leave so she could have plastic surgery; she did not present a doctor's statement either. *Ibid.* Petitioner also permitted Torbeck herself to take off for elective surgery in October 1985,

prior to her pregnancy; again, petitioner never requested a doctor's statement. *Ibid.* Lastly, petitioner placed Don Loewen on medical leave for several weeks without any proof of medical necessity.[1] Pet. App. A8, A14.

2. In May 1990, the Equal Employment Opportunity Commission (EEOC or Commission) filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint alleged that petitioner had treated Torbeck's request for a schedule adjustment differently than similar requests by non-pregnant employees solely because Torbeck was pregnant. EEOC contended that petitioner's conduct was discrimination on the basis of gender in violation of Title VII, including the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k). Pet. App. A2. The Pregnancy Discrimination Act amended Title VII to require employers to treat women "affected by pregnancy * * * or related medical conditions * * * the same * * * as other persons not so affected but [who are] similar in their ability or inability to work." 42 U.S.C. 2000e(k). After trial, the district court held that petitioner had violated Title VII.

The district court analyzed the evidence under the three-step framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973). Accordingly, it first determined that EEOC had established a prima facie case of discrimination by showing that Torbeck was qualified for her job and that petitioner had fired her while she was pregnant. Pet. App. A22-A23. It then turned to petitioner's

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[1] Although petitioner claims that the district court considered only three instances in which petitioner granted employee leave requests, Pet. 12, the district court found, and petitioner stipulated, that petitioner had granted Don Loewen's request for six weeks of medical leave. Pet. App. A8.

proffered justification for its actions. See *McDonnell Douglas*, 411 U.S. at 802-803. Petitioner claimed that it rejected Torbeck's schedule-adjustment request because she failed to show that such an adjustment was medically necessary; discharge, it contended, was proper because her refusal to work overtime constituted insubordination. The district court concluded that insubordination could constitute a legitimate, nondiscriminatory reason for discharging an employee. Pet. App. A25. Accordingly, the district court turned to the third step under *McDonnell Douglas*, see 411 U.S. at 804-805, and examined whether petitioner's stated reasons were, in fact, its real reasons—or whether they were a pretext for prohibited discrimination. Pet. App. A26-A31.

Noting "a pattern of adverse actions taken by management against Torbeck that began shortly after she announced her pregnancy," Pet. App. A27, it found that petitioner's asserted justifications were pretextual. Before Torbeck became pregnant, her work and work hours had never been criticized. Shortly after Torbeck announced her pregnancy, however, petitioner "counseled" Torbeck about her attitude toward overtime and her work. See Pet. App. A30; *id.* at A12. The justification for that criticism, the court concluded, was not credible; rather, petitioner's decision to "wr[i]te [Torbeck] up" was "a pretextual effort to establish a basis for its later action." Pet. App. A15.

More important, petitioner treated Torbeck's request for a schedule adjustment differently than requests made by similarly situated non-pregnant employees. Despite a policy "of attempting to accommodate" each employee's request and a history of doing so for non-pregnant employees, petitioner made no effort to accommodate Torbeck. Pet. App. A29. While petitioner asserted that it rejected Torbeck's

request because she had failed to show that a schedule adjustment was medically necessary, the court found that justification to be pretextual. First, petitioner had never required a showing of medical necessity when considering leave or schedule adjustment requests that were not pregnancy related; it only required such proof for Torbeck's pregnancy-related request. Pet. App. A30. Second, Torbeck did in fact provide evidence of medical necessity: She gave petitioner a letter from her doctor, something no other employee had done. Pet. App. A16. Third, petitioner never told Torbeck that she needed to prove "medical necessity"; nor did it provide her with an opportunity to do so. Pet. App. A27. Instead, petitioner deliberately avoided learning more of Torbeck's medical condition, even "instruct[ing] members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Thus, because petitioner (1) engaged in a pattern of adverse actions which began with Torbeck's pregnancy, (2) refused to offer Torbeck the same leave and schedule adjustments it offered to non-pregnant employees, and (3) asserted that it wanted proof that the adjustments were medically necessary despite never having required such proof from non-pregnant employees, the district court concluded that petitioner's asserted justification was a pretext for prohibited discrimination.

The court also rejected petitioner's argument that the Pregnancy Discrimination Act of 1978 (PDA) only protects a pregnant employee who shows that accommodation of her condition is medically necessary. Pet. App. A31-A32. The PDA, the court explained, requires employers to treat women affected by pregnancy the same way they treat

similarly situated non-pregnant employees. See Pet. App. A32. Thus, nothing in the PDA prohibited petitioner from requiring pregnant employees to prove that accommodation of their requests was medically necessary—so long as it required the same of non-pregnant employees. But, the court found, petitioner did not do that. Instead, petitioner required only pregnant employees to meet the higher justification of medical necessity. Pet. App. A27. Such discrimination against pregnant women in the allocation of leave and schedule adjustments, the court concluded, violated Title VII. Pet. App. A33.

3. The court of appeals unanimously affirmed. Pet. App. C1-C9. Submitting the case for determination without oral argument, Pet. App. C2 n.1, the court of appeals held that the district court properly applied the PDA and correctly found that petitioner had discriminated against Torbeck on account of her pregnancy. Pet. App. C6-C7. The court of appeals dismissed as "unconvincing" petitioner's argument that the employees whose treatment the district court had compared to Torbeck's were not similarly situated. That Torbeck, unlike those employees, was "certified * * * in 'good health' " was irrelevant, as petitioner had always granted requests for leave or schedule adjustment without inquiring into the employee's medical condition; it offered no legitimate justification for doing so with respect to Torbeck alone. Pet. App. C8. "In essence," the court of appeals noted, petitioner was arguing that, "despite a history of never inquiring into the actual physical condition of employees requesting leave, it should have been able to do so in Torbeck's case merely because she was pregnant. The P[regnancy] D[iscrimination] A[ct] was enacted

specifically to prevent this type of dissimilar treatment." *Ibid.*[2]

ARGUMENT

Petitioner asserts two objections to the decisions below. Neither involves a division in circuit authority; neither has application beyond the limited facts of this case; and neither has merit. Accordingly, further review is unwarranted.

1. The Pregnancy Discrimination Act of 1978 amended Title VII to require employers to treat women "affected by pregnancy * * * or related medical conditions * * * the same * * * as other persons not so affected but [who are] similar in their ability or inability to work." 42 U.S.C. 2000e(k). As this Court has explained, the Act "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983). Petitioner does not disagree. See Pet. 13-14. Nor does petitioner challenge the propriety of inferring prohibited discrimination from an employer's disparate treatment of similarly situated pregnant and non-pregnant employees. Pet. 13 ("In disparate treatment cases" the plaintiff may "raise an inference of unlawful discrimination" through "comparison of the treatment accorded to plaintiff with the treatment accorded other employees.") (internal quotation marks and citations

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[2] The court also rejected petitioner's argument that the PDA requires the district court to compare pregnant employees' leave requests only to similar leave requests from *male* employees, finding that such an argument "lacks merit." Pet. App. C7-C8. Petitioner does not assert that argument here. See Pet. 15 n.5.

omitted).[3] Indeed, petitioner does not even contend that the courts below misstated the law. Rather, petitioner simply argues that the courts below misapplied the law to these particular facts by basing their comparisons on employees who were not, in fact, similarly situated. Pet. 14 (courts below based inference of discrimination on "impermissible" and "baseless" comparisons of situations that were "foreign to each other"). That fact-bound contention does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, the contention is unfounded. In the approximately four pages devoted to the "comparison issue," Pet. 11-15, petitioner offers not a single reason why the other employees were not similarly situated to Torbeck. Each of the employees, like Torbeck, was under petitioner's unwritten leave policy. Pet. App. A29. Each, like Torbeck, requested leave or a schedule adjustment because of a medically related condition. Pet. App. A14-A15. And each—unlike Torbeck—had his or her request granted without any proof of medical necessity or any inquiry into his or her actual health. That unexplained disparate treatment properly raised an inference of discrim-

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[3] Accord *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) (A "plaintiff's task [is] to demonstrate that similarly situated employees were not treated equally."); 29 C.F.R. Pt. 1604 App., Nos. 5, 6, at 205 (employer must treat an employee who is temporarily unable to perform her job in the same manner it treats other temporarily disabled employees; employer must apply the same procedures for determining an employee's ability to work to pregnant and non-pregnant persons).

ination on account of pregnancy, as the courts below correctly held. Pet. App. A27-A29, C7.

Nonetheless, petitioner suggests in its question presented that Torbeck "unequivocally expresse[d] * * * her intent not to work more than 40 hours per week for the duration of her normal, healthy pregnancy, regardless of her actual physical condition." Pet. i; see also Pet. 11 ("It is undisputed that Phyllis Torbeck * * * was enjoying a normal, healthy pregnancy when she demanded that, because of her pregnancy, she be granted a categorical exemption from working overtime for the duration of her pregnancy."). Other employees, petitioner suggests, were different because they made a showing of need. Pet. i. ("[H]ealth related requests * * * from other employees had uniformly been granted only on an as-needed basis."); Pet. 7 (Torbeck did not show "that there was any medical necessity for elimination of further overtime."). Both suggestions are incorrect.

a. As an initial matter, it is not true that Torbeck refused to work overtime regardless of her physical condition; the district court specifically rejected that contention: "Contrary to [petitioner's] contentions, Torbeck did not refuse to work overtime." Pet. App. A17. What Torbeck did do was tell petitioner that she "intended to follow her doctor's recommendation," Pet. App. A12-A13, a recommendation which, of course, depended on her physical condition. As the district court explained, the accommodation Torbeck requested was "commensurate" with her physical complaint and its "medical basis." Pet. App. A16.

Nor is it true that Torbeck's request for accommodation was different because she failed to demonstrate "medical necessity." On the contrary, no other employee made, and petitioner never required, a showing of medical necessity. Pet. App. A30. Such disparate

proof requirements for pregnant and non-pregnant employees is itself facially discriminatory, as the court of appeals explained: An employer with "a history of never inquiring into the actual physical condition of employees requesting leave" may not do so in the case of a pregnant employee solely "because she is pregnant. The PDA was enacted specifically to prevent this type of dissimilar treatment." Pet. App. C8.

In any event, Torbeck's alleged failure to prove medical necessity was not the real reason petitioner denied her request. Pet. App. A29. Petitioner never required any other employee to prove medical necessity; it never told Torbeck such proof had to be produced; and it never gave her an opportunity to do so. Instead, petitioner first asserted that such proof was required when it began defending this lawsuit. Pet. App. A27-A30; *id.* at A13-A14. And Torbeck did prove medical need: She gave petitioner a letter from her doctor, far greater evidence of need than any non-pregnant employee provided. Pet. App. A16. Petitioner simply chose to ignore it. See pp. 13-14, *infra.*

b. Petitioner's reliance on the fact that Torbeck had a "normal, healthy pregnancy," Pet. i, 7, is similarly misplaced. Nothing in the PDA distinguishes between healthy and difficult pregnancies; and certainly nothing in it licenses employers to treat healthy pregnancies disfavorably so long as they afford difficult ones equality. Instead, the PDA recognizes that any pregnancy—healthy or otherwise—is a medical condition and must be treated equally with all others. See 42 U.S.C. 2000e(k). Here, Torbeck's healthy pregnancy produced "fatigue, nausea, lower back pain, and headaches," normal symptoms properly treated with rest. Pet. App. A29-A30. Because petitioner would have accommodated pursuit of

such treatment by an employee suffering similar symptoms on account of a medical condition other than pregnancy, it was required to permit employees suffering those symptoms on account of pregnancy to do the same. But rather than treat all medical conditions equally, petitioner denied Torbeck's request, affording it unfavorable treatment because it was prompted by a "healthy" pregnancy rather than some other medical condition.

c. Finally, petitioner asserts that the courts below created "substantive requirements" which require "preferential treatment" of pregnant workers. Pet. 11, 13. That assertion is baseless. At no point did the courts below hold that the PDA requires employers to treat pregnant workers more favorably than other workers. Indeed, the court of appeals made it abundantly clear that all the PDA requires is *equal* treatment of pregnancy-related and other disabilities. See Pet. App. C5 (PDA prevents "*differential* treatment of women in all aspects of employment based on the condition of pregnancy" (emphasis added; internal quotation marks omitted)); *id.* at C7 (The PDA "requires courts to inquire whether the employer treats pregnancy or pregnancy related conditions *differently* than other medical conditions.") (emphasis added). Thus, petitioner's error was not its failure to give Torbeck what she asked for; it was refusing to accord Torbeck the *same* accommodations afforded to similarly situated non-pregnant employees.[4]

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[4] Likewise, the district court, Pet. App. A17, did not hold that an employer's leave policies must be "reasonable," Pet. 14 n.4. Instead, the court merely made a factual finding that Torbeck's request for a schedule adjustment was reasonable and therefore met the requirements of petitioner's liberal leave and schedule adjustment policy, Pet. App. A16-A17, a finding the

2. Petitioner's second argument is that the PDA did not apply because Torbeck never told petitioner that she had a pregnancy-related medical disability. Pet. 15-16. Specifically, petitioner asserts that "a finding of discrimination under Title VII may not be predicated upon facts or employee attributes which were not made known to the employer at the time of the [employer's] challenged decision." Pet. 16. That contention is factually and legally baseless.

Contrary to petitioner's assertion, Torbeck did communicate the facts that she was pregnant and that her pregnancy was the basis for her request for a schedule adjustment. She even presented petitioner with a letter from her doctor stating that he recommended a schedule adjustment "because of her pregnancy." Pet. App. A11, A12, A15-A17.[5] As the district court found, "a medical basis for [Torbeck's requested] schedule modification existed" and Torbeck communicated that medical basis by presenting petitioner with her doctor's letter. Pet. App. A16. But rather than accept the recommendation of Torbeck's doctor, petitioner chose to ignore it—with no medical basis for doing so. Pet. App. A13. If petitioner had truly desired or needed more information regarding

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court of appeals upheld, Pet. App. C8-C9. Because reasonableness was the touchstone by which petitioner determined whether or not to grant requested accommodations, see Pet. App. A29, it was proper for the court to determine whether Torbeck's request met that standard. After all, if Torbeck's request did not meet petitioner's usual standard, then the gender discrimination caused Torbeck no harm: Her request would have been denied in any event.

[5] It is true, as petitioner contends, that the letter attests to Torbeck's "good health." Pet. 15. But, as explained above, see pp. 11-12, *supra*, the question of whether Torbeck was in good or ill-health is irrelevant.

Torbeck's actual condition, petitioner could easily have requested it from Torbeck or her doctor. But petitioner did not. Pet. App A15-A16, A29-A30. In fact, petitioner must have been well aware of the basis for petitioner's request, as it studiously avoided learning more of it: Petitioner actually "instructed members of its management to make only limited and narrow inquiries of Torbeck in the meetings that preceded her firing." Pet. App. A17. Thus, contrary to petitioner's assertions, Torbeck did communicate the basis for her request and her medical condition to petitioner. Petitioner simply chose to ignore it.

In any event, even if the facts were open to dispute —and they are not—petitioner's challenge would still fail. The protections of the PDA are not triggered, as petitioner seems to believe, Pet. 15-16, by the employee's communication that accommodation of her pregnancy-related disability is "medically necessary." All the statute requires is that employers treat pregnant employees the same way they treat similarly situated non-pregnant employees. 42 U.S.C. 2000e(k) ("[W]omen affected by pregnancy * * * shall be treated the same for all employment-related purposes" as similarly situated non-pregnant workers.); see also *Carney* v. *Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8th Cir. 1987) (the PDA was added to Title VII "to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy"). As explained above, see pp. 10-11, *supra*, had petitioner routinely required its employees to provide evidence of the medical basis for the accommodations they sought, it would have been free to require such evidence from pregnant employees like Torbeck. But petitioner did not require proof of medical necessity from non-pregnant employees; nor did it ever require detailed descriptions of

their symptoms. It never even requested a doctor's letter, something Torbeck, unlike any other employee, produced—but which petitioner inexplicably rejected. In short, only Torbeck's pregnancy-related request was subjected to exacting scrutiny and then rejected. Such unequal and unfavorable treatment of pregnancy compared to other medical conditions is precisely the type of discrimination the PDA proscribes. The courts below were correct to so hold.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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